Supreme Court, U.S.
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No. 01-800

IN THE

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr., Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), following long-standing precedent, this Court unanimously ruled that courts, rather than arbitrators, should decide the arbitrability of a dispute unless there is clear and unmistakable evidence that the parties agreed to allow the arbitrators to decide that question. The Tenth Circuit's opinion faithfully applied *First Options* after reviewing the relevant arbitration agreements to find no such clear and unmistakable evidence.

The Tenth Circuit's ruling is unexceptional, and its decision has no far-reaching implications to arbitration law. Rather, petitioner merely seeks to have this Court review several provisions of the parties' arbitration agreements and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedures, a Code which is subject to ongoing review and revision by the NASD.

The question presented is:

Whether the Tenth Circuit properly interpreted several provisions of the parties' arbitration agreements to find that they presented no clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute.

STATEMENT PURSUANT TO RULE 29.6

Dean Witter Reynolds, Inc., Respondent, is 100% owned by Morgan Stanley Dean Witter & Co., a publicly traded company.

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STATEMENT OF THE CASE

Dean Witter Reynolds, Inc. ("Dean Witter") filed an action in the District Court of Colorado seeking to enjoin an arbitration proceeding instituted by Petitioner Karen Howsam in March 1997. Howsam's NASD arbitration claim sought to recover on claims arising from her purchase of several limited partnerships. Dean Witter asserted that the dispute was ineligible for arbitration under the terms of the parties' arbitration agreement, and that, because the eligibility of the dispute presented an issue of arbitrability, the court and not the arbitrators should decide the question. App. 4-6.

Howsam and Dean Witter entered into two arbitration agreements. App. 3-5. The first agreement, the ACCESS Client Service Agreement ("1992 ACCESS Agreement"), was executed in 1992. App. 3. The second arbitration agreement is a Uniform Submission Agreement ("1997 Submission Agreement"), which Howsam executed when she submitted her arbitration claim to the NASD in March 1997. App. 4-5.

The 1997 Submission Agreement states that the arbitration would be conducted in accordance with the rules and provisions of the NASD Code, including the NASD Code of Arbitration Procedure. App. 4-5. The agreement specifically provides:

> The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

App. 4-5.

Another provision of the 1997 Submission Agreement states that the parties "have read the procedures and rules of the sponsoring organization relating to arbitration." App. 5. One of the relevant provisions of the NASD Code of Arbitration Procedure, Section 10304, states in pertinent part:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

App. 5.[1]

Based on this six-year eligibility rule, Dean Witter requested that the district court enjoin the pending NASD arbitration until the court determined which, if any, of Howsam's claims are eligible for submission to arbitration. Relying on *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), Dean Witter asserted that, because the parties' agreements to arbitrate do not reflect clear and unmistakable evidence that the parties authorized the arbitrators to decide the arbitrability of the dispute, that question was properly submitted to the court. App. 5-6.

The district court dismissed Dean Witter's complaint, ruling that the parties had agreed to arbitrate the issue of arbitrability. App. 31-36. The district court relied upon two provisions in the 1992 ACCESS Agreement: (i) a provision stating that the parties would arbitrate "all controversies"; and (ii) a disclosure

1. The six-year limit imposed by the NASD eligibility rule is the longest length of time that brokerage firms are mandated by the rules of the Securities and Exchange Commission to maintain their customer documents. *See, e.g.*, 17 C.F.R. §§ 240.17a-4

statement reflecting that, by entering into the arbitration agreement, the parties were waiving all remedies in court, including the right to a jury trial. App. 33-34.

Relying on *First Options*, the Tenth Circuit reversed the district court's dismissal, ruling that the arbitration agreements do not reflect clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute. App. 1-30. The court accordingly held that arbitrability was an issue for the court to decide. App. 24-29.

In reaching its conclusion, the Tenth Circuit examined the language of the 1992 ACCESS Agreement and the 1997 Submission Agreement, as well as the interplay between the two agreements. App. 12-15, 26-28. The court determined that the 1997 Submission Agreement had supplemented the earlier 1992 ACCESS Agreement by defining the issues that were to be arbitrated:

> [T]he earlier arbitration agreement had been supplemented by the submission agreement, at least to the extent that it identified the rules and regulations by which the plaintiff, through her election of the NASD as the arbitral body, agreed to be bound.

App. 14. Based on the contractual language, the Tenth Circuit found no clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability. App. 26-28.

First, the court noted that both agreements were silent on the issue of who decides arbitrability and, examining the "all controversies" clause in the 1992 ACCESS Agreement, found no clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability issue. App. 26. Further,

the court examined the waiver of judicial remedies clause and found as follows:

> At most, this language is ambiguous and therefore does not satisfy the *First Options* requirement of "clear and unmistakable" intent by the parties to have the NASD § 10304 arbitrability issue decided by an arbitrator rather than a court. The language does not refer specifically to arbitrability, and it is unlikely that it was intended to state that Howsam could not in any circumstance resort to the courts. Such a literal reading of the provision would mean that Howsam had waived any ability to seek an order compelling arbitration, *see* 9 U.S.C. §§ 3, 4, or to seek judicial enforcement of an arbitration award, *see id.* §9, or even to seek vacatur of the arbitrator's award . . . [s]uch a reading would essentially nullify Howsam's arbitration rights entirely, and yet if Howsam did not intend by this clause to waive all of her rights to seek judicial assistance with the arbitration process, she can hardly argue that the clause "clearly and unmistakably" waives both parties' rights to seek a judicial determination of arbitrability.

App. 27-28.

Finally, noting the conflict among the circuits, on which conflict Howsam relies in seeking a writ of certiorari, the Tenth Circuit focused on the NASD's interpretation of its eligibility rule:

> We recognize that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code

> § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts. The Third, Sixth, Seventh, Tenth and Eleventh Circuits have all answered that question in the affirmative, while the First, Second, Fifth, Eighth and Ninth Circuits have all answered that question in the negative. Ultimately, questions of arbitrability and who decides whether a particular claim is arbitrable are matters of the parties' intent. It therefore seems to this court that amendment by the NASD and other arbitration forums of their rules and submission agreements to "clearly and unmistakably" resolve this issue one way or another is long overdue. Until the arbitration organizations undertake such action, however, we are bound by the presumptions established in *First Options* and our own Tenth Circuit precedent. . . .

App. 28-29 (citation and footnote omitted).[2]

REASONS FOR DENYING THE WRIT

The legal principles underpinning the Tenth Circuit's ruling were announced – and have repeatedly been affirmed – by this Court. As a fundamental starting point, "[a]rbitration is a matter of contract and a party cannot be required to submit

2. The court noted that the NASD "has proposed at least two amendments to § 10304 in the last seven years that would have resolved the 'who decides arbitrability' question conclusively in favor of the NASD deciding whether a particular claim is time-barred," but that "either the NASD has withdrawn, or the Securities and Exchange Commission has refused to approve," the proposed amendments. App. 29 n.9.

to arbitration any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citations and internal quotations omitted). Three years after pronouncing this principle, the Court reiterated the rule in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), holding that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," but that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478 (citations and internal quotations omitted).

> Arbitration is a matter of consent, not coercion, and the parties are generally free to structure their agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so to may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479.

As the Court noted in *AT&T*: "[T]he principles necessary to decide this case are not new. They were set forth over 25 years ago in a series of cases known as the "Steel Workers Trilogy," *i.e.*, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *AT&T*, 475 U.S. at 648. The Court reiterated that the question whether the parties had agreed to arbitrate a dispute was for the court to decide:

> [T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Id. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582-83 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970)). The Court accordingly held that it was "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate." *Id.* at 651.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court unanimously set forth the standards for determining whether the courts or the arbitrators are to decide the issue of arbitrability. The Court held that the courts decide whether the parties have agreed to arbitrate a dispute unless there is "clear and unmistakable evidence" that the parties agreed to have the arbitrators decide the issue. *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). If the arbitration agreement is silent or ambiguous, *the courts are to decide the issue of arbitrability*. *Id.* at 944-45. The Court noted

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter

> they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted).

This case presents nothing more than a proper application of this Court's decisions by the Tenth Circuit. The governing precedent summarized above has created four primary rules: (1) arbitration is a matter of contact; (2) a party can not be required to submit to arbitration a dispute it has not agreed to arbitrate; (3) the courts generally decide arbitrability, *i.e.*, whether the parties have agreed to submit a dispute to arbitration; and (4) it is only when there is clear and unmistakable evidence of an intent to allow the arbitrators to decide the issue that the courts should not decide arbitrability. The Tenth Circuit's opinion, holding that the courts are to decide the arbitrability of the dispute between Dean Witter and Howsam – based on the particular language of the agreements between the parties, which does not reflect the requisite clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability – is a correct application of these rules.

There is no need for the Court to revisit these principles of arbitration law. While the Circuits are admittedly split on the interpretation of the NASD Code's language and the interplay of that language with the provisions of various arbitration agreements, there is no broad national rule that could emerge from this case – which is, after all, merely a case of contract interpretation.

I. The Tenth Circuit Properly Applied *First Options*.

The Tenth Circuit was presented with an issue of arbitrability. The very wording of NASD's six-year rule, stating that "no dispute . . . shall be eligible for submission under this Code," § 10304, NASD Code of Arbitration Procedure, makes this clear. As *First Options* noted, the issue of arbitrability focuses on whether the parties agreed to arbitrate the merits of the dispute. 514 U.S. at 942. The question whether certain claims are *excluded* from arbitration, like the exclusion in *AT&T*, goes directly to the issue of arbitrability. Relying on its prior opinion in *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996), the Tenth Circuit determined that the very language of § 10304, which language excludes a category of claims from submission to arbitration, means that § 10304 governs the arbitrability of the parties' dispute – and thus triggered the *First Options* standards. App. 17-19.

In *Cogswell*, the court held that § 10304 " 'can reasonably be read in only one way – as a substantive limit on the claims that the parties have contracted to submit to arbitration.' " *Cogswell*, 78 F.3d at 479 (quoting *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993)). The *Cogswell* court continued:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be shown or selected." Webster's Third New International Dictionary 736 (1966). "Submission" is defined as the act of commi[tting something] for consideration, study or decision. *Id.* at 2277.

Id. at 479 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 513 (3d Cir. 1990)).[3] This Court has described arbitrability in a similar fashion. *See, e.g., AT&T Tech.*, 475 U.S. at 648 ("a party cannot be required to *submit* to arbitration any dispute which he has not *agreed* so to submit.") (emphasis added; citations omitted); *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contact between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."); *id.* at 945 ("given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration. . . .").[4] Hewing closely to *First Options*, the Tenth Circuit looked to the language of the parties' arbitration agreements to determine whether there was clear and unmistakable evidence of an agreement to allow the arbitrators to decide arbitrability.

Howsam argued that the "all controversies" language in the 1992 ACCESS Agreement, combined with another

3. It is this submission language that distinguishes *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Howsam argues that the Tenth Circuit's opinion is contrary to *John Wiley* and that § 10304 is a matter of "procedural" arbitrability, which is for the arbitrators to decide. This is a surprising assertion, primarily because Howsam never cited to *John Wiley* in her brief to the Tenth Circuit. In any event, the Tenth Circuit's opinion in no way jeopardizes *John Wiley*, which addressed a fundamentally different agreement. Here, the agreement expressly precludes the submission of claims that are more than six years old.

4. Howsam conceded below that arbitrability was normally an issue for the court to decide. The focus of her argument was that, in this case, the parties had clearly and unmistakably provided otherwise in their arbitration agreement.

provision disclosing that the parties "waiv[e] their right to seek remedies in court, including the right to a jury trial" provided the necessary clear and unmistakable evidence to overcome the *First Options* presumption. The court, however, noted that *none* of these provisions so much as mentioned arbitrability, such that there is no clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability. App. 25-28. The court also observed that the NASD has taken shifting positions on the issue of whether the arbitrators or the courts should decide arbitrability. App. 29 n.9.

The Tenth Circuit properly undertook the *First Options* analysis to determine whether there was clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability issue. This Court has repeatedly ruled on the manner in which courts should deal with the arbitrability issue, and granting certiorari in this case would add nothing to that jurisprudence. Even if the Tenth Circuit's ruling that § 10304 of the NASD Arbitration Code concerns the arbitrability of the parties' dispute (because the provision excludes a category of claims), were somehow incorrect, that ruling is contract-specific and presents no question of national importance. This case hinged on resolving the precise language and effect of several provisions in the arbitration agreements and the NASD Code of Arbitration, and nothing more.

Moreover, any ruling by this Court on the interpretation of the NASD Code sections at issue could easily be rendered moot by the NASD.[5] As the Tenth Circuit noted in its

5. Some courts that have reviewed the § 10304 eligibility issue have examined other provisions of the NASD Code, such as former § 35 (now § 10324) to determine whether there was clear and (Cont'd)

decision, the NASD Arbitration Code is subject to amendment or revision – and there have been several attempts over the years, including one as recently as 1998, to modify or revise § 10304. App. 29 n.9 ("the NASD has proposed at least two amendments to § 10304 in the last seven years that would have resolved the 'who decides arbitrability' question conclusively in favor of the NASD deciding whether a particular claim is time-barred under § 10304"). The proposals would have made the NASD Director the final authority on whether claims were eligible under § 10304.

The most recent proposal was either withdrawn or not approved by the Securities Exchange Commission.[6] The need for any definitive resolution by this Court, however, should await further action by the NASD, particularly in light of the Tenth Circuit's call for precisely such action. App. 29.

(Cont'd)
unmistakable evidence of an intent to allow the arbitrators to decide the issue. *See, e.g., FSC Secs. Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996).

6. The NASD's sometimes conflicting views and comments on § 10304 have affected how some courts have interpreted the section. *See, e.g., PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) (considering 1988 NASD letter stating NASD would not process ineligible claims); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 596 (1st Cir. 1996) (noting that in 1996 the NASD's view was that the NASD Code was silent on whether courts or arbitrators decide the eligibility of claims); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 n.6 (D. Minn. 1993) (noting NASD has taken conflicting positions on interpretation of predecessor to § 10304), *aff'd*, 14 F.3d 1310 (8th Cir. 1994).

II. Petitioner's "Efficiency" Agreement Was Rejected by This Court in *First Options*.

In an argument that runs directly counter to the Court's ruling in *First Options*, Howsam asserts that having the courts resolve the arbitrability issue imposes "a wasteful layer of litigation in the arbitration process." Petition at 9. This Court rejected a similar "efficiency" argument in *First Options*:

> There is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms. . . .

514 U.S. at 947 (citations omitted).

Arbitrability goes to the heart of enforcing agreements according to their terms. Having courts decide arbitrability necessarily results in litigation. Indeed, that is exactly what happened in *AT&T*, where this Court reversed the Seventh Circuit with directions to have the court interpret whether a particular dispute was excluded from arbitration, 475 U.S. at 649, and in *First Options*, where the Third Circuit had examined the record to determine whether the parties had agreed to arbitrate. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995). Howsam's contentions conflict with the overriding policy of arbitration law and with *First Options*; there is no reasoned basis in the Petition upon which the Court should grant certiorari to revisit its ruling in *First Options*.

III. New York Law Does Not Govern This Case.

In a final misplaced effort to attract the Court's attention to her Petition, Howsam argues that the Tenth Circuit erred by refusing to follow the New York courts' interpretation of § 10304. Howsam maintains that the Tenth Circuit was obliged to follow *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). This argument, like Howsam's other contentions, is at odds with the Court's prior rulings.

As a starting point, Howsam does not dispute that this case is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the parties' underlying relationship involves interstate commerce. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court ruled that 9 U.S.C. § 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act." *Id.* at 24. The Tenth Circuit analyzed *Sacharow*, and held that it was not bound to follow New York law because federal substantive arbitration law applies to this dispute, relying on *First Options*, and its own prior decisions. App. 21-24. ("On the arbitrability issue before us, then, we are not governed by how the New York Court of Appeals construed similar language, but are governed instead by the federal law of arbitrability, as that law has been established in the Tenth Circuit by *Cogswell*.").

Moreover, this Court has previously addressed a New York choice-of-law provision in an arbitration agreement in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). In that case, Shearson challenged an award of punitive damages by an arbitration panel on the ground that a New York choice-of-law provision incorporated New York arbitration law, which precluded arbitrators from awarding

punitive damages. The Court held that the New York choice-of-law provision did not apply to the arbitration provisions:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration. . . .

Id. at 63-64.

Under *Mastrobuono*, a provision that requires the application of New York *substantive* law does not implicate New York *arbitration* law. The Tenth Circuit's ruling on the New York law issue, like the court's other rulings in this case, is both unremarkable and a correct application of this Court's precedent, in this instance the law announced by this Court in *Moses H. Cone* and *Mastrobuono*.

CONCLUSION

For the foregoing reasons, Dean Witter respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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